BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL D. SMITH Claimant	)	
VS.	)	
ROAD DOG CORPORATION Respondent	)	Docket No. **1,051,091**
AND	)	
PROTECTIVE INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the July 21, 2010 preliminary hearing Order and July 22, 2010 Nunc Pro Tunc Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

The Administrative Law Judge (ALJ) ordered respondent to pay Michael D. Smith temporary total disability compensation beginning June 9, 2010, and to provide him medical treatment with Dr. Glenn Amundson.

Respondent requests review of whether Smith's accidental injury arose out of and in the course of his employment or whether his injury is the natural and probable consequence of a preexisting injury.

Smith requests that the ALJ's Nunc Pro Tunc Order and Order be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

At the July 20, 2010 preliminary hearing the claimant requested temporary total disability compensation and medical treatment with Dr. Amundson. Respondent denied

claimant suffered accidental injury arising out of and in the course of employment. In the alternative, respondent argued that claimant's current need for medical treatment was not related to the alleged April 30, 2010 accident.

After the preliminary hearing, the Administrative Law Judge (ALJ) entered an Order which ordered respondent to pay temporary total disability compensation and also authorized Dr. Amundson to treat claimant. The ALJ made no factual findings, nor any analysis of the issues. However, it is implicit in the Order that claimant suffered a compensable injury because he awarded benefits.

Michael Smith is the owner of Road Dog Corporation, sole shareholder and principal employee/driver. Road Dog is leased to FedEx and loads are exclusively hauled for FedEx. Smith is not an employee of FedEx. He purchased his own workers compensation coverage through Protective Insurance. FedEx contracted with Road Dog in December 2006 and Smith has been hauling freight continuously since that time.

In 2003 Smith was in an automobile accident which injured his head, neck, shoulder and lower back. He was off work for a couple of months and then returned to his normal job. From March 25, 2010 through April 2, 2010, Smith had chiropractic treatments. He was on vacation when the treatments took place.

> Q. What was the reason for your visits?
>
> A. I just had general pain in my back and partway down my leg and normal aches and pains I would say from being a truck driver.
>
> Q. After receiving those treatments, was there any change in your condition?
>
> A. At the end of the treatment, yeah, I was fine.[1]

Claimant said his pain at that time was primarily in his back and down into his buttocks and right thigh. Claimant testified that after the chiropractic treatment he was able to return to work driving his rig for extended periods of time until his accident on April 30, 2010. After the accident claimant now reports that his leg is numb all the way down to his foot and toes.

Smith described his accident that occurred on April 30, 2010, in the following fashion:

> We haul double trailers. There's a dolly in between both trailers. I unhooked the lines and we dropped the rear trailer, pulled ahead, and then you have to drop the dolly so you can unhook under the other one. I dropped the dolly and I went to push

[1] P.H. Trans. at 12.

> it out of the way and that's when I injured my back; push it out of the way so that the tractor can come around and hook up to it, move it out of the way of the trailers.
>
> Q. And what happened? What did you experience when you pushed that dolly out of the way?
>
> A. A sharp pain in my lower back and then down my leg.[2]

Smith was not able to continue working and he told his co-driver that he had hurt his back. He crawled into the sleeper to rest for the night hoping that his back would be better in the morning. The next morning Smith was in excruciating pain and had his co-driver take him to Shawnee Mission Medical Center's emergency room for treatment. Smith was not able to get out of the sleeper cab without assistance and was unable to walk.

X-rays were taken and pain medicine was prescribed. Smith was advised to follow up with his personal care physician, Dr. Gordon, on May 3, 2010. Dr. Gordon noted at his examination that "this is a workman's comp case" and that Smith had done some heavy lifting on the job on April 30, 2010.[3] Dr. Gordon's impression was that Smith was suffering severe pain most likely secondary to an acute lumbar disc herniation. Dr. Gordon ordered an MRI and referred claimant to an orthopedic surgeon. The MRI on May 7, 2010, indicated a broad based disc bulge at L4-L5, a central to right disc herniation at L5-S1 which contacts the right S1 nerve root and a mild bulge at L3-L4.

Smith was referred to Dr. Glenn Amundson and was seen on May 24, 2010. Dr. Amundson took a history that Smith had pushed a dolly out of the way and immediately had excruciating low back pain. Dr. Amundson recommended lumbar epidural injections and imposed work restrictions. The insurance company's counsel then provided Dr. Amundson with medical records regarding chiropractic treatment Smith had received from March 25, 2010 through April 2, 2010. Apparently Dr. Amundson was asked his opinion regarding the effect that condition had on Smith's claimed work-related injury. Dr. Amundson responded in pertinent part:

> With respect to the effect of the claimed work-related injury while working for Fed-Ex on his pre-existing condition, this is difficult to quantitate. The patient omitted this from his original history and the forwarded medical records do not have any directly comparable measurements of pain, disability or function. It can be stated clearly and within a reasonable degree of medical certainty that this condition was certainly pre-existing and his on-the-job injury was most likely a natural

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[2] *Id*. at 7.

[3] *Id*., Cl. Ex. 1.

> consequence of the natural progression and existence of his pre-existing condition and disease.[4]

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[5] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[6] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[7] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[8]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[9]

Respondent argues that Dr. Amundson's report establishes that Smith's accident was a natural and probable consequence of his pre-existing condition.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[10] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[11]

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[4] *Id*., Resp. A.

[5] K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[6] K.S.A. 44-501(a).

[7] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[8] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[9] *Graff v. Trans World Airlines,* 267 Kan. 854, 983 P.2d 258 (1999).

[10] *Demars v. Rickel Manufacturing Corporation, 223 Kan. 374,Syl. ¶ 1, 573 P.2d 1036 (1978); Chinn v. Gay & Taylor, Inc., 219 Kan. 196, Syl. ¶ 4, 547 P.2d 751 (1976); Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 336, 678 P.2d 178 (1984).*

[11] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, Syl. ¶ 3, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp*., 24 Kan. App.2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[12] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[13] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[14] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[15] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury,

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[12] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[13] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[14] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[15] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[16]

In *Logsdon*,[17] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

The evidence in this case establishes that Smith had sought chiropractic care and then had returned to his work duties without restrictions. Smith then suffered an acute injury at work that led to diagnostic studies which revealed a herniated disc. Dr. Gordon attributed Smith's condition to work. Dr. Amundson was provided the same history of an acute injury at work but when he was provided the medical records from Smith's recent chiropractic treatment, he opined Smith's condition was a natural consequence of his pre-existing condition. The problem with Dr. Amundson's opinion is that he recognized the difficulty in determining the effect of the pre-existing condition and he further admitted that the medical records did not have comparable measurements of pain, disability or function.

Smith testified that after his chiropractic treatment he returned to work without restrictions and was able to accomplish his job duties for that approximate month until the injury on April 30, 2010. Nor is there any indication Smith had sought additional treatment for his back until the April 30, 2010 accident. Smith then suffered the accidental injury at work and described his condition as worse and different than the condition for which he had sought chiropractic treatment. Dr. Gordon attributed Smith's back condition to a work-related injury. Based upon the record compiled to date this Board Member finds Smith has met his burden of proof that he suffered a new and separate accidental injury arising out of and in the course of his employment with respondent.

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[16] *Id.* at 728.

[17] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1-3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[18] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[19]

WHEREFORE, it is the finding of this Board Member that the Orders of Administrative Law Judge Steven J. Howard dated July 21 and July 22, 2010, are affirmed.

IT IS SO ORDERED.

Dated this 30th day of September 2010.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Brent M. Johnston, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

[18] K.S.A. 44-534a.

[19] K.S.A. 2009 Supp. 44-555c(k).